Supreme Court, U.S.
FILED
07-937 JAN 14 2008
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CITY NATIONAL BANK OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, FARM SERVICES AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court should retain jurisdiction of a case removed pursuant to 28 U.S.C. § 1442 where it would otherwise have original jurisdiction.

2. Whether the derivative jurisdiction doctrine should be modified where its application would bar a citizen's claims against the United States.

3. Whether applying the derivative jurisdiction doctrine to cases removed pursuant to 28 U.S.C. § 1442, but not pursuant to 28 U.S.C. § 1441, violates due process and equal protection.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, John Palmer and Stacey Palmer were plaintiffs below, and Bank One, N.A., and Stuart Kaufmann were defendants below, but did not participate in the proceedings before the United States Court of Appeals for the Fourth Circuit, and are respondents under this Court's Rule 12.6.

Pursuant to this Court's Rule 29.6, undersigned counsel states that City Holding Company is the parent company of City National Bank of West Virginia, a national banking association, and that no other publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner City National Bank of West Virginia ("City") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 498 F.3d 236 (4th Cir. 2007). Pet. App. 1-17. Its order denying City's petition for rehearing is unreported. Pet. App. 18.

JURISDICTION

The Fourth Circuit denied City's petition for rehearing on October 15, 2007, and entered its mandate on October 29, 2007. Pet. App. 19. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> [N]or shall any person . . . be deprived of . . . property, without due process of law. . . .

U.S. Const. amend. V.

The Seventh Amendment to the U.S. Constitution provides, in relevant part:

> In Suits at common law . . . the right of trial by jury shall be preserved. . . .

U.S. Const. amend. VII, § 1.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> [N]or shall any State deprive any person of . . . property, without due process of law; nor deny to any person . . . the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT

This case provides the Court with the opportunity to resolve a conflict among the Circuits regarding the continued viability of the derivative jurisdiction doctrine or, in the alternative, to craft an exception where its application would bar a citizen's claim against the United States under state law.

In the proceedings below, the Fourth Circuit affirmed the dismissal of City's claims against the United States Department of Agriculture ("USDA"), Farm Services Agency ("FSA"), solely because the manner in which such claims found their way to federal court.

Two of City's customers, John and Stacey Palmer ("Palmers"), secured a series of loans relying upon written representations by FSA that it would guarantee the loans. FSA had previously guaranteed loans for City's customers using the same procedure.

Ultimately, FSA failed to guarantee the loans, which supported City's extension of a below-market interest rate, and the Palmers defaulted. After City foreclosed, the Palmers sued City in state court, complaining that the terms of the loans were not as represented by City and FSA. City then instituted a third-party complaint against FSA for contribution and/or implied indemnification, but FSA removed the action to federal court under 28 U.S.C. § 1442.

Following FSA's removal of the case to federal court, it moved to dismiss under the doctrine of derivative jurisdiction. Although the district court determined that it had original jurisdiction of City's contribution/indemnification claims, it nevertheless dismissed such claims under the doctrine of derivative jurisdiction and remanded the case to state court.

Upon appeal to the United States Court of Appeals for the Fourth Circuit, dismissal of the claims was affirmed. Although the Fourth Circuit was sympathetic to City's arguments that application of the derivative jurisdiction barred its claims against the United States under applicable state law, it stated, "There is no authority in this Circuit or any other that would allow us to craft specific exceptions to the

derivative-jurisdiction doctrine based upon state rules of procedure." 498 F.3d at 246.

Although the Fourth Circuit acknowledged that the United States Court of Appeals for the Eighth Circuit has abrogated the doctrine of derivative jurisdiction in all cases, regardless of the method of removal, 498 F.3d at 245, it refused to follow suit, *id.*

Under the Fourth Circuit's decision, City is forever barred from litigating its claims against the United States because applicable state law provides that any contribution claim which is not joined in the primary action is deemed waived. If the Palmers had sued City in federal court, City could successfully maintain its third-party claims against the United States in federal court. Merely because Palmers instituted suit in state court, however, should not result in the loss of City's right to seek contribution and/or indemnification from the United States.

REASONS FOR GRANTING THE PETITION

The derivative jurisdiction doctrine has its roots in this Court's decision in *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922), in which it held, "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."

Over the years, as the Fourth Circuit noted, the doctrine has been widely criticized:

> Such results were inefficient and "the subject of a great deal of deserved criticism." 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction 3d* § 3722, at 481, 487 (3d ed. 1998); *see, e.g., Washington v. Am. League of Prof'l Baseball Clubs*, 460 F.2d 654, 658-59 (9th Cir. 1972) (characterizing the derivative-jurisdiction doctrine as a "kind of legal tour de force that most laymen cannot understand, particularly in a case where the federal court not only has subject matter jurisdiction, but has exclusive subject matter jurisdiction"); *Welsh v. Cunard Lines, Ltd.*, 595 F. Supp. 844, 846 (D. Ariz. 1984) ("'[D]erivative jurisdiction' is an archaic concept that impedes justice. It is out of tune with the federal rules. Courts and commentators agree, and urge that, while derivative jurisdiction may be justified conceptually, it leads to unfortunate results and should be abandoned.").

498 F.3d at 244.

Eventually, as the Fourth Circuit observed, Congress amended 28 U.S.C. § 1441 in 1985 to legislatively abrogate the judicially-created doctrine for cases removed pursuant to that statute. *Id.* Following this amendment, however, the Circuits have been divided on the continued vitality of the doctrine in cases removed under 28 U.S.C. § 1442.

Although, in the instant case, the Fourth Circuit felt obliged to adhere to the doctrine, despite its impact on City's right to seek redress from the United States, other Circuits have held to the contrary. In *North Dakota v. Fredericks*, 940 F.2d 333, 336 (8th Cir. 1991), the Ninth Circuit stated as follows:

> The doctrine of derivative jurisdiction, never based on anything explicit in the removing statutes, but rather a judicial gloss upon them, has now been overruled by Congress. . . . One need not look far for a reason. Consider the following example: suppose someone sued you in state court claiming infringement of a patent. Realizing that such matters are inherently federal, you file a petition for removal. The federal court, however, refuses to entertain the case. Federal district courts have original and exclusive jurisdiction of patent-infringement cases. The state court therefore had no jurisdiction at all, and the federal court on removal, as a sort of off-shoot of the state court, can have none. The result is that a federal court refuses to entertain a case over which only it has jurisdiction. . . . Congress acted in 1985 to repeal this doctrine because it realized that it made no sense. The only effect (assuming the statute of limitations, or some other intervening reason, wasn't a bar to the new action) was to multiply proceedings. This kind of rigmarole is unworthy of a civilized judicial system.

Of course, as noted by the Fourth Circuit, *Fredericks* was decided prior to the 2002 enactment of 28 U.S.C. § 1441(f), but with respect to the intent of Congress, there is a division of opinion:

> Commentators speculate that the amendment was intended to endorse the *Fredericks* approach and be the death knell of derivative jurisdiction for all removals. *See, e.g.*, 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction 3d* § 3721, at 191 (2007 Supp.). Yet these same commentators conclude that the amendment did not accomplish this purpose: "[N]ew § 1441(f) limits the abrogation of the derivative jurisdiction doctrine to cases removed under 28 U.S.C.A. § 1441." *Id.* The legislative history of the 2002 amendment is "sparse," *Glorvigen v. Cirrus Design Corp.*, No. 06-2661, 2006 WL 3043222, at *3 (D. Minn. Oct.24, 2006), and the Conference Report on the amendment does not discuss the reason for the modification to current § 1441(f), *see* H.R. Conf. Rep. 107-685, reprinted in, 2002 U.S.C.C.A.N. 1120, 1151. Thus, there is no legislative history to support the view that Congress intended to embrace *Fredericks* and eliminate the derivative-jurisdiction entirely.

498 F.3d at 245.

Whatever the intent of Congress, the derivative jurisdiction is a judicially-created doctrine that can be abrogated or modified as the demands of justice

warrant. Where, as in the instant case, application of the derivative jurisdiction doctrine extinguishes a citizen's right to seek contribution and/or indemnification from the United States, it should either be abrogated or modified.

The petition for a writ of certiorari should be granted to address a division among the Circuits as to the vitality of the derivative jurisdiction doctrine or, in the alternative, to modify the doctrine where its application will extinguish a citizen's right to seek contribution and/or indemnification from the United States.

I. This Court Should Abrogate The Derivative Jurisdiction Doctrine.

The United States is obligated by the Fifth Amendment to afford its citizens due process of law. "Due process in its essence means fundamental fairness." *Hampton v. United States*, 425 U.S. 484, 495 (1976) (Powell, J., concurring).

Fundamental fairness includes a right of access to the courts. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). Indeed, the point in "recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Id.* at 414-15.

"The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of

due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

Yet, under the Fourth Circuit's decision in this case, City could prosecute its claims against the United States if the Palmers' suit had originated in federal court, but is forever barred merely because it originated in state court. This Court has never had occasion to address the derivative jurisdiction doctrine in this context.

A. Under West Virginia law, City's contribution and indemnification claims against the United States will be barred if not joined in the underlying action.

In Syllabus Point 4 of *Howell v. Luckey*, 205 W. Va. 445, 518 S.E.2d 873 (1999), the Supreme Court of Appeals of West Virginia held, "The right of contribution . . . must be asserted by filing a third-party claim. . . ." Moreover, in Syllabus Point 5 of *Howell*, it held:

> A defendant may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case, when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure.

The rationale for these rules is sound:

> The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice – to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts.

Board of Education v. Zando, Martin & Milstead, Inc., 182 W. Va. 597, 603, 390 S.E.2d 796, 802 (1990). Moreover, it has stated, "joinder of contribution claims serves to ensure that those who have contributed to the plaintiff's damages share in that responsibility. We have also provided a method of apportioning damages among the defendants according to fault in negligence cases." *Id.* at 604, 390 S.E.2d at 803.

Although the Supreme Court of Appeals of West Virginia has not addressed whether implied indemnification claims are also barred if not joined, the elements of such claims would indicate that such holding is likely:

> The requisite elements of an implied indemnity claim in West Virginia are a showing that: (1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not

> contribute to the injury; and (3) for which a putative indemnitor should bear the fault for causing because of the relationship that the indemnitor and indemnitee share.

Syl. pt. 4, *Harvest Capital v. Dept. of Energy*, 211 W. Va. 34, 560 S.E.2d 509 (2002). Moreover, it has held:

> The general principle of implied indemnity arises from equitable considerations. At the heart of the doctrine is the premise that the person seeking to assert indemnity – the indemnitee – has been required to pay damages caused by a third party – the indemnitor. In the typical case, the indemnitee is made liable to the injured party because of some positive duty created by statute or common law, but the actual cause of the injury was the act of the indemnitor.

Syl. pt. 2, *Hill v. Joseph T. Ryerson & Sons, Inc.*, 165 W. Va. 22, 268 S.E.2d 296 (1980). Finally, it has stated, "Implied indemnity is based upon principles of equity and restitution and one must be without fault to obtain implied indemnity." Syl. pt. 2, *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982).

Under West Virginia law, City will be precluded from asserting the United States' negligence, which it contends is the sole cause of the Palmers' damages, if the United States is not joined as a party. Syl. pt. 2, *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (2001) ("It is improper for counsel to make arguments to the jury regarding a party's omission

from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff's injury where the evidence establishing the absent party's liability has not been fully developed."). Therefore, City will be left without any remedy,[1] even if it is without fault and all of the Palmers' damages were the result of the United States' acts and omissions.

B. Under federal law, City has a substantive right to assert its contribution and indemnification claims against the United States.

This Court has long held that the Federal Tort Claims Act allows citizens to implead the United States for contribution. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669-70 (1977);

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[1] City disagrees with the Fourth Circuit's statements regarding alternative remedies. 498 F.3d at 247. Under state law, it will be unable to have the jury assess any fault against the United States and, accordingly, will be unable to satisfy the requisite elements of implied indemnity. If the case is tried with the United States as a party, the jury will be able to assess fault against it. If it determines that the Palmers' losses were caused solely by the United States, City can look to the United States not only for any liability to the Palmers, but for its expenses in defending the action. Syl. pt. 5, *Valloric v. Dravo Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987). If City is unable to have any fault assessed against the United States, it cannot hope to satisfy the "without fault" requirement for implied indemnity. Therefore, any subsequent attempt to litigate an indemnification claim against the United States under the Tort Claims Act will be an exercise in futility.

United States v. Yellow Cab Co., 340 U.S. 543, 554-55 (1951). Likewise, under the Federal Tort Claims Act, citizens have the right to implead the United States for indemnification. *See, e.g., Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. ___, 127 S. Ct. 2411 (2007); *see also Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 197 (1983) ("The Federal Tort Claims Act permits an indemnity action against the United States 'in the same manner and to the same extent' that the action would like against 'a private individual under like circumstances.'") (citations omitted). City's right to implead the United States for contribution and indemnification in this case, however, will be forever frustrated if the Fourth Circuit's decision is allowed to stand.

When Congress amended 28 U.S.C. § 1442 in 1996, the Senate report observed that "[t]his section allows civil actions . . . against Federal agencies . . . to be removed to Federal district court. A Federal forum in such cases is important since state court actions against Federal agencies . . . often involve complex Federal issues and Federal-State conflicts." S. Rep. No. 104-366, 30-31, *reprinted in* 1996 U.S.C.C.A.N. 4202, 4210. The House report makes similar observations. H.R. Rep. No. 105-317, at 19-20 (1996).

Although Congress intended that suits against the United States be litigated in federal court, there is nothing to indicate that it intended to deprive citizens of any forum. Obviously, City has no objection to litigating its third-party claims in federal court.

City does object, however, to being deprived of any forum in which to litigate those claims.

There is nothing in the legislative histories of either 28 U.S.C. § 1441 or 28 U.S.C. § 1442 justifying a different treatment upon removal. Moreover, there is no rational basis for allowing federal courts to retain jurisdiction of suits removed pursuant to 28 U.S.C. § 1441, but not allowing the retention of jurisdiction in suits removed pursuant to 28 U.S.C. § 1442. If federal courts are allowed to retain jurisdiction for suits removed under 28 U.S.C. § 1441 even where the state court lacked jurisdiction, they should be allowed to retain jurisdiction for suits removed under 28 U.S.C. § 1442, as in this case, where the state court lacked jurisdiction.

"Derivative jurisdiction," it has been observed, "is an archaic concept that impedes justice. It is out of tune with the federal rules. Courts and commentators agree, and urge that, while derivative jurisdiction may be justified conceptually, it leads to unfortunate results and should be abandoned." *Welsh v. Cunard Lines, Ltd.*, 595 F. Supp. 844, 846 (D. Ariz. 1984).

Understandably, the Fourth Circuit was constrained by what it perceived was binding precedent. This Court, however, is not so constrained and City urges it to abrogate the derivative jurisdiction doctrine as anachronistic and contrary fundamental notions of due process and equal protection.

II. This Court Should Create An Exception To The Derivative Jurisdiction Doctrine Where Its Application Would Result In Extinguishment Of A Citizen's Claims Against The United States.

In the proceedings before the Fourth Circuit, City urged the creation and application of an exception to the derivative jurisdiction doctrine where its application will result in extinguishment of a citizen's claims against the United States. The Fourth Circuit held, however, that "[t]here is no authority in this Circuit or any other that would allow us to craft exceptions to the derivative-jurisdiction doctrine based on state rules of procedure. Because the application of the derivative jurisdiction doctrine affects a district court's jurisdiction over the case, case-specific exceptions are not appropriate." 498 F.3d at 246.

Derivative jurisdiction, however, is a judicially-created doctrine that may be abrogated or modified where the interests of justice warrant. In *Marshall v. Marshall*, 547 U.S. 293, 293 (2006), for example, this Court recently observed, "Among longstanding limitations on federal-court jurisdiction otherwise properly exercised are the so-called 'domestic relations' and 'probate' exceptions. Neither is compelled by the text of the Constitution or federal statute." Likewise, City submits that the derivative jurisdiction is neither compelled by the text of the Constitution or federal statute.

Indeed, in *Marshall*, this Court noted, "In view of lower federal-court decisions expansively interpreting the two exceptions, this Court reined in the domestic relations exception in *Ankenbrandt v. Richards*, 504 U.S. 689, and endeavored similarly to curtail the probate exception in *Markham v. Allen*, 326 U.S. 490." *Id.* Similarly, City submits that the circumstances of this case warrant creation of an exception to the derivative jurisdiction doctrine.

City takes exception to the Fourth Circuit's description of the state law barring contribution claims that are not joined in the underlying suit as "procedural." Certainly, the filing of a third-party complaint for contribution involves utilization of a state rule of procedure, but the "right to contribution" is substantive, not procedural. *Union Pacific R. Co. v. Mullen*, 966 F.2d 348, 350 (8th Cir. 1992) ("the substantive right to contribution accrues when the injury occurs"); *Greyhound Lines, Inc. v. Cobb County*, 681 F.2d 1327, 1331 (11th Cir. 1982) ("a defendant tortfeasor . . . has both a substantive right and procedural mechanism to assert contribution claims against joint tortfeasors."). Plainly, what is being denied to City is not the "procedural right" to proceed against the United States for contribution and indemnification under state law, but the "substantive right" to proceed as that law will preclude any future contribution claim.

Where application of the derivative jurisdiction doctrine will effectuate extinguishment of a citizen's claims against the United States, City respectfully

submits that an exception to the derivative jurisdiction is warranted. None of the goals of 28 U.S.C. § 1442 will be frustrated by creation of such exception. The United States will retain its federal forum. The Palmers will have a right to litigate their claims. Finally, City will have the ability, under West Virginia substantive law, to have a jury allocate fault against the United States and vindicate its right to contribution, if the United States is determined to be a joint tortfeasor, or implied indemnity, if the United States is determined to be solely at fault for causing any damages to the Palmers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 14, 2008

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN PALMER; STACEY PALMER,
Plaintiffs-Appellees,
and
UNITED STATES DEPARTMENT OF AGRICULTURE, Farm Service Agency,
Third Party Defendant-Appellee,
v.
CITY NATIONAL BANK, of West Virginia,
Defendant-Appellant,
and
STUART KAUFMANN; BANK ONE, N.A.,
Defendants.

No. 06-1151

Appeal from the United States District Court
for the Southern District of
West Virginia, at Charleston.
Robert C. Chambers, District Judge.
(2:05-cv-00458)

Argued: May 23, 2007

Decided: August 16, 2007

Before NIEMEYER and GREGORY, Circuit Judges, and DAVID C. NORTON, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Gregory wrote the opinion, in which Judge Niemeyer and Judge Norton joined.

COUNSEL

ARGUED: Ancil Glenn Ramey, Steptoe & Johnson, Charleston, West Virginia, for Appellant. Isaac J. Lidsky, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., for Appellees. **ON BRIEF:** Scott E. Johnson, Steptoe & Johnson, Charleston, West Virginia, for Appellant. Peter D. Keisler, Assistant Attorney General, Gary Call, United States Attorney, Michael S. Raab, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., for Appellees.

OPINION

GREGORY, Circuit Judge:

The doctrine of derivative jurisdiction requires that a federal court's jurisdiction over a removed case mirror the jurisdiction that the state court had over the action prior to removal. In this appeal, the district court applied the doctrine and dismissed a removed third-party claim against federal agency defendants because the state court did not possess jurisdiction over those defendants. Derivative jurisdiction has been frequently criticized and Congress has eliminated the doctrine for cases removed under 28 U.S.C. § 1441, the general removal statute. This abrogation,

however, did not extend to cases removed under other provisions. Thus, our precedent, in accord with the statutory removal scheme, dictates the application of the derivative-jurisdiction doctrine in cases removed under the federal-officer removal statute, 28 U.S.C. § 1442. No authority exists for creating an exception to the doctrine that would apply in this case. Furthermore, application of derivative jurisdiction in this case does not violate the Equal Protection or Due Process Clauses of the Constitution. Accordingly, we affirm the district court's dismissal of the third-party claim.

I.

The facts of this appeal are straightforward. City National Bank of West Virginia issued a series of three loans to John and Stacey Palmer. City National alleges that the loans were made in reliance upon the guarantee of the Farm Service Agency ("FSA") of the U.S. Department of Agriculture ("USDA"). After City National issued the loans, the Palmers became delinquent with their payments, and the FSA did not make payment on the loans. City National then foreclosed on the Palmers' farm. Thereafter, the Palmers brought suit in the Circuit Court of Kanawha County, West Virginia, against City National, alleging, *inter alia,* fraud and breach of contract. City National moved for leave to file a third-party complaint against the FSA and USDA (the "federal defendants"). The motion was granted, and City National served a third-party complaint upon the

federal defendants, alleging that the FSA failed to honor the loan guarantees and seeking indemnity and contribution.

Pursuant to 28 U.S.C. § 1442(a)(1) (2000), the federal defendants filed a notice of removal, based on their status as federal agencies. After removal to the United States District Court for the Southern District of West Virginia, the federal defendants filed a motion to dismiss the third-party complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and to remand the remaining claims to state court. The federal defendants argued that in cases removed under § 1442(a)(1) the doctrine of derivative jurisdiction applied and the district court's jurisdiction was identical to the state court's jurisdiction prior to removal. Because the United States had not waived its sovereign immunity to contract and tort suits in state court, the state court lacked jurisdiction over the federal defendants. Thus, the federal defendants argued, the district court also lacked jurisdiction. Relying on the derivative-jurisdiction doctrine, the district granted the motion to dismiss, holding that the state court did not have jurisdiction over the third-party claim and thus the district court lacked jurisdiction over the claim as well. The district court remanded the remaining claims. This appeal followed.

II.

Whether at the suggestion of the parties or otherwise, this Court has an obligation to verify the existence of appellate jurisdiction before considering the merits of an appeal. *See Hyman v. City of Gastonia,* 466 F.3d 284, 286-87 (4th Cir. 2006). 28 U.S.C. § 1447(d) prohibits this Court from exercising appellate jurisdiction over an order remanding a removed case to state court for lack of subject-matter jurisdiction. *See* 28 U.S.C. § 1447(c), (d); *Thermtron Prods., Inc. v. Hermansdorfer,* 423 U.S. 336, 346 (1976), *overruled on other grounds by Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 714-15 (1996). In this case, because both the stated reason and the only plausible legal explanation for the remand order was the district court's lack of subject-matter jurisdiction over the case following the dismissal of the federal defendants, the remand was made pursuant to 28 U.S.C. § 1447(c). *See Powerex Corp. v. Reliant Energy Servs., Inc.,* 551 U.S. ___, ___, 127 S. Ct. 2411, 2417-18 (2007). As such, this case falls within the ambit of the § 1447(d) bar on appellate review. "Several cases, however, provide for limited exceptions to the reach of § 1447(d)." *Nordan v. Blackwater Sec. Consulting, LLC (In re Blackwater),* 460 F.3d 576, 582 (4th Cir. 2006). The exception fashioned by *City of Waco v. U.S. Fidelity & Guaranty Co.,* 293 U.S. 140 (1934), allows for limited review of collateral issues, even if the remand order itself is insulated from review under § 1447(d). *See, e.g., In re Blackwater,* 460 F.3d at 586.

In *Waco,* a third-party defendant removed a state case on the grounds of diversity. 293 U.S. at 141. Following removal, the district court determined that the third-party defendant had not been impleaded properly, and dismissed the third-party claim. *Id.* at 141-42. The dismissal destroyed diversity jurisdiction and, accordingly, the district court remanded the remaining claims to state court. *Id.* at 143. Viewing the district court's decree as embodying three separate orders, the Supreme Court held that the City of Waco could appeal from the order dismissing the third-party claim. *Id.* The Court noted that the remand itself could not be appealed, but that "in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause." *Id.* Furthermore, if the dismissal were not appealable, it would be conclusive upon the City of Waco. *Id.* This Court restricts the applicability of the *Waco* exception to purportedly reviewable orders that (1) have a preclusive effect upon the parties in subsequent proceedings and (2) are severable, both logically and factually, from the remand order itself. *In re Blackwater,* 460 F.3d at 586.

After oral argument in this case, the Supreme Court issued its opinion in *Powerex,* 551 U.S. ___, 127 S. Ct. 2411, clarifying the scope of the *Waco* exception. Accordingly, we must consider *Powerex* to decide whether we continue to possess appellate jurisdiction in this matter before considering the merits of City National's appeal. *Cf. Hyman,* 466 F.3d at 286-87

(concluding after oral argument that court lacked appellate jurisdiction).

Powerex concerned a suit by various plaintiffs in state court against certain energy companies, alleging that the companies conspired to fix prices in violation of California law. *See* 127 S. Ct. at 2414. In turn, the energy defendants filed cross-claims for indemnity against, among others, two federal government agencies, a Canadian governmental entity (BC Hydro), and Powerex, a wholly owned subsidiary of BC Hydro. *Id.* The cross-defendants removed to federal court, with the federal agencies relying on § 1442(a) and BC Hydro and Powerex relying on § 1441(d) and their status as foreign states under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2). *Id.*

The plaintiffs moved to remand the case to state court, arguing that Powerex was not a foreign state and that the cross-claims against the U.S. agencies and BC Hydro were barred by sovereign immunity. *Id.* The district court concluded that (1) the federal agencies were immune from suit in state court; (2) BC Hydro enjoyed sovereign immunity under the FSIA; and (3) Powerex did not qualify as a foreign state under the FSIA. *Id.* at 2414-15. The district court then remanded the entire case to state court. *Id.* at 2415. The federal agencies and Powerex appealed. The former argued that the district court should have dismissed them outright because of sovereign immunity. Powerex argued that it was a foreign state under the FSIA and thus entitled to remove. The plaintiffs

argued that § 1447(d) barred both appeals. The Ninth Circuit rejected the invocation of § 1447(d), concluding that the provision did not bar it from reaching issues of law decided by the district court prior to remand. *Id.*

After concluding that § 1447(d) applies to remands for lack of subject-matter jurisdiction even where the removal itself was proper, and that the remand of the district court was based on a lack of subject-matter jurisdiction, the Supreme Court noted that the Ninth Circuit relied upon the *Waco* exception in rejecting the application of § 1447(d). *Id.* at 2419. The Court held that *Waco* "does not permit an appeal when there is no *order* separate from the unreviewable remand order." *Id.* The Court continued, noting that Powerex "can point to no District Court order, separate from the remand, to which it objects and to which the issue of its foreign sovereign status is material." *Id.* In conclusion, Powerex's "invocation of *Waco* amounts to a request for one of two impermissible outcomes: an advisory opinion as to its FSIA status that will not affect any order of the District Court, or a reversal of the remand order." *Id.* After concluding that no other exception to § 1447(d) existed, the Court vacated the relevant portion of the Ninth Circuit's judgment and remanded with instructions to dismiss for want of jurisdiction. *Id.* at 2421.

Our most recent discussion of the *Waco* doctrine made clear that "the purportedly reviewable order [must] have a conclusive effect upon the parties' substantive rights." *In re Blackwater,* 460 F.3d at 586.

We require that the challenged order have a preclusive effect in subsequent proceedings to satisfy the conclusiveness requirement. *Id.* In addition, "the reviewable decision [must] be able to be 'disaggregated' from the remand order itself." *Id.* Thus, "logical and factual severability, along with conclusiveness, are central requirements of *Waco*'s exception to § 1447." *Id.*

The requirements set forth in *In re Blackwater* governing the applicability of the *Waco* exception conform to *Powerex*'s recent pronouncement. Both requirements ensure that the appealed order is a truly separate order from the remand order and that any action taken by this Court on appeal does not affect the remand order. The conclusiveness requirement guarantees that any purportedly appealable decision is a binding decision on the merits, and not a mere finding of the district court that may be relitigated in the state court upon remand. *See, e.g., id.* at 590 ("[T]he district court's finding that complete preemption did not create federal removal jurisdiction will have no preclusive effect on a subsequent state-court defense of federal preemption."). Similarly, by requiring logical and factual severability, the disaggregation requirement mandates that any purportedly reviewable decision made by the district court was actually prior to the remand order and was a legally discrete conclusion. The severability requirement ensures that the appealable decision was truly distinct from the remand decision and not "merely a subsidiary legal step[ ] on the way to [the district

court's] determination that the case was not properly removed." *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993) (quotation marks omitted). If a decision of the district court meets both requirements of *In re Blackwater,* the decision is truly a separate order from that of the remand and thus reviewable under our precedent and *Powerex.*

The conclusion that the *In re Blackwater* requirements satisfy *Powerex* is supported by Justice Scalia's discussion of the *Waco* exception in his dissent in *Osborn v. Haley,* 549 U.S. ___, 127 S. Ct. 881, 909 (2007). *Osborn* concerned the question of whether § 1447(d) barred appeal of a district court's refusal to substitute the United States as a defendant in a removed action brought against a federal employee under the Westfall Act, 28 U.S.C. § 2679, resulting in a remand of the action to state court. 127 S. Ct. at 893-96. The majority viewed the Westfall Act's certification and substitution regime as directly conflicting with § 1447(d), and thus framed the issue as choosing between two "forum-selecting rule[s]." *Id.* at 896. Because the certification and substitution process was "[t]ailor-made for Westfall Act cases," the majority concluded that Congress intended it to take precedence over § 1447(d). *Id.*

In dissent, Justice Scalia did not view the Westfall Act as conflicting with § 1447(d) and analyzed whether the district court's refusal to substitute the United States as a defendant fell within the *Waco* exception to § 1447(d). *See id.* at 908-09 (Scalia, J., dissenting). Justice Scalia concluded:

> [T]here is a crucial distinction between [*Waco*] and [*Osborn*]: In *Waco,* reversal of the dismissal would not have subverted the remand. There was *no question* that the suit would proceed in state court regardless of whether the diverse party was rightfully or wrongfully dismissed. Nowhere did the *Waco* Court so much as hint that the District Court might need to reexamine its remand order; to the contrary, it was clear that the remand would occur, no matter what. . . . In other words, the remand order and the dismissal order were truly "separate orders"; we could review – even reverse – the dismissal order without affecting the remand or its impact on the case.

Id. (citation omitted) (quoting *Waco,* 293 U.S. at 142). Justice Scalia noted that if the appeals court substituted the United States as defendant, but did not vacate the remand order as per § 1447(d), the case would return to state court styled as *Osborn v. United States* and would be immediately dismissed because federal district courts have exclusive jurisdiction over FTCA actions. *Id.* Thus, Justice Scalia concluded, "unlike in *Waco,* the District Court's decision on a preliminary matter – here, Westfall Act certification – is inextricably intertwined with the remand order. Since that is so, there is no jurisdiction to review either determination." *Id.* at 909-10.

The conclusiveness and disaggregation requirements of *In re Blackwater* accord with Justice Scalia's persuasive discussion of when a purportedly reviewable

order is truly separate from a remand order. A district court decision that has a preclusive effect on the parties and that is logically and factually separable from the remand order is a decision that can be reviewed by this Court without affecting the remand order. Reversal of an independently binding decision, separated from the remand order logically and factually, would not undermine the remand order itself. In sum, the *In re Blackwater* requirements are sufficient to ensure that this Court reviews only decisions that are separate orders from unreviewable remand orders in keeping with the holding of *Powerex.*

Thus, in order to determine whether we have appellate jurisdiction over City National's appeal, we must decide whether the district court's application of derivative jurisdiction and its subsequent dismissal of the United States meet the *In re Blackwater* requirements. The first requirement is that "the purportedly reviewable order have a conclusive effect upon the parties' substantive rights." *In re Blackwater,* 460 F.3d at 586. "We have interpreted this conclusiveness requirement to mean that the challenged order must have a preclusive effect in subsequent proceedings." *Id.* In this case, City National challenges an order dismissing the federal defendants from the case entirely. The dismissal cannot be revisited by the state court on remand, because the federal defendants are no longer parties to the action and were not subject to the remand order. *Cf. Nutter,* 4 F.3d at 322 (concluding that district court's jurisdictional findings incident to remand could be relitigated

in state court and thus the findings were not conclusive upon the parties). As in *Waco,* if the dismissal is not reversed, it is "conclusive upon" City National. 293 U.S. at 143.

In addition to conclusiveness, *In re Blackwater* requires that a purportedly reviewable decision be logically and factually severable from the remand order. 460 F.3d at 586. This requirement is satisfied in the instant case. To begin, the decision on derivative jurisdiction necessarily preceded the remand, because the dismissal of the federal defendants was the very action that deprived the court of jurisdiction and necessitated the remand. *See, e.g., Beauclerc Lakes Condo. Ass'n v. City of Jacksonville,* 115 F.3d 934, 935 (11th Cir. 1997) ("Where . . . the remand is a consequence of the dismissal of claims creating federal jurisdiction, that dismissal is reviewable on appeal."). Furthermore, the dismissal is logically separable from the remand order. The issue of the application of derivative jurisdiction is wholly separate from the reason for the remand. Although the remand was necessitated by the dismissal that resulted from the application of the derivative-jurisdiction doctrine, the legal basis of the remand – lack of subject-matter jurisdiction – did not depend on the district court's interpretation of derivative jurisdiction. In other words, the application of derivative jurisdiction was not a subsidiary legal step to the district court's determination that the case had to be remanded. *Cf. In re Blackwater,* 460 F.3d at 590; *Nutter,* 4 F.3d at 321. The federal defendants properly

removed the case under § 1442(a)(1) because they were federal officers. Only after the district court dismissed the claims against the federal defendants did it analyze whether a remand was necessitated because of a lack of jurisdiction. Accordingly, the decision from which City National appeals was legally distinct from the remand order.

Were we to reverse the dismissal of the federal defendants, the remand order would not be "subverted." The remand order did not include the federal defendants and the state-court proceedings between the Palmers (as plaintiffs) and City National (as defendant) will proceed regardless of any action we take on this appeal. Thus, as in *Waco,* the suit will proceed in state court regardless of whether the federal defendants were correctly dismissed. *See Osborn,* 127 S. Ct. at 909 (Scalia, J., dissenting). By contrast, in *Powerex,* Powerex was a party to the remand order. If the district court's decision on Powerex's foreign sovereign status were reversed, any appellate court action regarding Powerex would, by necessity, affect the remand order. If the appellate court chose to reverse the district court, but could take no action, then its decision on Powerex's foreign sovereign status would have been "an advisory opinion as to [Powerex's] FSIA status." *Powerex,* 127 S. Ct. at 2419.

Thus, the requirements of *In re Blackwater* are satisfied: City National appeals from a ruling of the district court that is conclusive as well as logically and factually severable from the remand order.

Because the issue of the district court's application of derivative jurisdiction is a reviewable order wholly separate from its remand order, we have appellate jurisdiction to consider City National's appeal under the *Waco* exception to § 1447(d).

III.

We review de novo a dismissal for lack of subject-matter jurisdiction. *Welch v. United States*, 409 F.3d 646, 650 (4th Cir. 2005).

A.

The derivative-jurisdiction doctrine arises from the theory that a federal court's jurisdiction over a removed case derives from the jurisdiction of the state court from which the case originated. As the Supreme Court explained in *Lambert Run Coal Co. v. Baltimore & Ohio Railroad Co.*, 258 U.S. 377, 382 (1922), "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." The application of the doctrine often resulted in the dismissal of removed actions that were within the exclusive jurisdiction of the federal courts, because the state court where the action was filed lacked jurisdiction. *See, e.g., id.* (dismissing removed action based on violation of Interstate Commerce Commission rule

because federal courts have exclusive jurisdiction over such suits); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988) (dismissing portion of removed case brought under Securities Act of 1934 because federal courts have exclusive jurisdiction over such suits). Such results were inefficient and "the subject of a great deal of deserved criticism." 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction 3d* § 3722, at 481, 487 (3d ed.1998); *see, e.g., Washington v. Am. League of Prof'l Baseball Clubs,* 460 F.2d 654, 658-59 (9th Cir. 1972) (characterizing the derivative-jurisdiction doctrine as a "kind of legal *tour de force* that most laymen cannot understand, particularly in a case where the federal court not only has subject matter jurisdiction, but has exclusive subject matter jurisdiction"); *Welsh v. Cunard Lines, Ltd.*, 595 F. Supp. 844, 846 (D. Ariz. 1984) ("'[D]erivative jurisdiction' is an archaic concept that impedes justice. It is out of tune with the federal rules. Courts and commentators agree, and urge that, while derivative jurisdiction may be justified conceptually, it leads to unfortunate results and should be abandoned.").

Accordingly, in 1985, Congress amended the general removal statute, 28 U.S.C. § 1441, by adding § 1441(e): "The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat.

633, 637 (1986) (codified as amended at 28 U.S.C.A. § 1441(f) (2007)). Following the 1985 amendment, this Court continued to apply the doctrine for removals effectuated under sections other than § 1441, including § 1442. *See Kasi v. Angelone,* 300 F.3d 487, 504 n.6 (4th Cir. 2002) ("[A] federal court's jurisdiction upon removal under § 1442(a)(1) is derivative of the state court's jurisdiction. . . ."); *United States v. Williams,* 170 F.3d 431, 433 (4th Cir. 1999) (same); *Cromer,* 159 F.3d at 879 (same); *Boron Oil Co. v. Downie,* 873 F.2d 67, 70 (4th Cir. 1989) (same); *accord In re Elko County Grand Jury,* 109 F.3d 554 (9th Cir. 1997) (applying derivative-jurisdiction doctrine in case removed under § 1442); *Edwards v. U.S. Dep't of Justice,* 43 F.3d 312 (7th Cir. 1994) (same). The Eighth Circuit, however, read the amendment as abrogating the entire doctrine, regardless of the method of removal. *See North Dakota v. Fredericks,* 940 F.2d 333, 337 (8th Cir. 1991) ("[T]he policy of Congress underlying new § 1441(e) supports the complete abandonment of the derivative-jurisdiction theory, even though the words of the statute clearly do not reach this far.").

B.

Whether the Eighth Circuit correctly interpreted the 1986 amendment is academic, because in 2002 Congress again amended § 1441, creating a new § 1441(e) and redesignating the prior § 1441(e) as § 1441(f) and slightly changing its language. 21st Century Department of Justice Appropriations Authorization Act,

Pub. L. No. 107-273, § 11,020(b)(3)(A), 116 Stat. 1758, 1827 (2002). Thus, the new § 1441(f) reads: "The court to which *a civil action is removed under this section* is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." *Id.* (emphasis added).

Commentators speculate that the amendment was intended to endorse the *Fredericks* approach and be the death knell of derivative jurisdiction for all removals. *See, e.g.,* 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction 3d* § 3721, at 191 (2007 Supp.). Yet these same commentators conclude that the amendment did not accomplish this purpose: "[N]ew § 1441(f) limits the abrogation of the derivative jurisdiction doctrine to cases removed under 28 U.S.C.A. § 1441." *Id.* The legislative history of the 2002 amendment is "sparse," *Glorvigen v. Cirrus Design Corp.,* No. 06-2661, 2006 WL 3043222, at *3 (D. Minn. Oct. 24, 2006), and the Conference Report on the amendment does not discuss the reason for the modification to current § 1441(f), *see* H.R. Conf. Rep. 107-685, *reprinted in,* 2002 U.S.C.C.A.N. 1120, 1151. Thus, there is no legislative history to support the view that Congress intended to embrace *Fredericks* and eliminate the derivative-jurisdiction entirely. Courts examining the amendment have agreed with this conclusion. *See, e.g., Barnaby v. Quintos,* 410 F. Supp. 2d 142, 144 (S.D.N.Y. 2005) ("In amending

the statute in 2002, and replacing less precise language with much more specific language, Congress left no doubt that Section 1441(f) applies only to removals under Section 1441 and not to removals under any other section of the United States Code.").

Following the 1985 amendment to § 1441, this Court has applied the derivative-jurisdiction doctrine in several cases involving removal under § 1442. Whatever the intent of the 2002 amendment, its result was that § 1441(f) is more clear than former § 1441(e) in abrogating derivative jurisdiction only with respect to removals effectuated under § 1441. Thus, our holdings in *Kasi, Williams,* and *Cromer* are strengthened, rather than weakened, by the enactment of the new § 1441(f). Accordingly, because the plain language of § 1441(f) limits the abrogation of derivative jurisdiction to removals under § 1441 and because our precedent holds that the doctrine is viable for removals under § 1442, the doctrine applies to the removal at issue in this case.

C.

City National urges that we create and apply an exception to the derivative-jurisdiction doctrine because West Virginia law compelled City National to implead the federal defendants or waive its claims against them. There is no authority in this Circuit or any other that would allow us to craft specific exceptions to the derivative-jurisdiction doctrine based on state rules of procedure. Because the application of

the derivative jurisdiction doctrine affects a district court's jurisdiction over the case, case-specific exceptions are not appropriate. In this case, the state court did not possess jurisdiction over City's third-party claim against the federal defendants. Accordingly, the district court did not gain proper jurisdiction of the claim upon its removal.

Fredericks is not to the contrary. Rather than creating an exception, the Eighth Circuit abrogated the entire doctrine on the basis of its view of the equity of the statute. *See Fredericks,* 940 F.2d at 337-38 (discussing doctrine of the equity of the statute and concluding that Congress had "given [courts] more than a hint" as to its disapproval of derivative jurisdiction, thus justifying its complete abrogation). As explained above, we cannot reach such a result in this case because the amendment to the removal statute since *Fredericks* has made it more, rather than less, clear that the abrogation contained within § 1441 applies only to removals under that section.

IV.

City National raises two constitutional arguments that the application of the derivative jurisdiction in this case violates both the Equal Protection and Due Process Clauses. Both of these arguments fail.

A.

In considering an equal protection challenge, "a statutory classification that neither employs inherently suspect distinctions nor burdens the exercise of a fundamental constitutional right will be upheld if the classification is rationally related to a legitimate state interest." *Star Scientific Inc. v. Beales,* 278 F.3d 339, 351 (4th Cir. 2002). If, however, the regulation impinges on a fundamental right or contains inherently suspect distinctions, "we exercise strict scrutiny review, upholding the statute only if it is narrowly tailored to serve a compelling state interest." *Plyler v. Moore,* 100 F.3d 365, 373 (4th Cir. 1996).

In this case, City National claims that application of derivative jurisdiction in a case removed under § 1442, when the doctrine would not be applied in a case removed under § 1441, unconstitutionally burdens its fundamental right of access to the courts. The district court's application of derivative jurisdiction prevented City National from litigating its claims against the federal defendants in the removed action. City National remains free to bring a separate action against the federal defendants in an appropriate forum, *i.e.,* the Court of Federal Claims, for its contract action, in accordance with the Tucker Act, and a district court, for its indemnity claims, in accordance with the FTCA. Thus, any fundamental right of judicial access that City National has to bring its claims has not been infringed upon as City National has not yet availed itself of the appropriate federal fora for resolving its claims against the federal

defendants. *Cf. Lewis v. Casey,* 518 U.S. 343 (1996) (discussing actual-injury requirement as prerequisite to suit alleging violation of fundamental right of access to courts); *McCoubrey v. Kellogg, Krebs & Moran,* 7 Fed. Appx. 215, 222 (4th Cir. 2001) ("The application of the statute of limitations in a given suit, not its potential to bar a future suit, is what raises a due process claim.").

City National argues that if it brought a subsequent suit for indemnity or contribution against the federal defendants in a proper forum, any court would apply West Virginia compulsory joinder law to bar the action. Even assuming, *arguendo,* that this hypothesis is correct, the operation of a substantive rule of law to bar a suit does not violate the right of access to a judicial forum. *See Plyler,* 100 F.3d at 373 ("Simply put, the Inmates have confused the right of access to the courts with the scope of the available substantive relief."); *cf. Dinh v. Rust Int'l Corp.,* 974 F.2d 500, 502 (4th Cir. 1992) ("[T]here is no federal or state constitutional right to the continued existence of common law causes of action.").

Thus, the application of the derivative-jurisdiction doctrine in this case does not burden City National's fundamental right to access the courts. As such, our review proceeds under the rational-basis standard. *See, e.g., Plyler,* 100 F.3d at 373 (citing *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993)). Under this standard, we afford the challenged statute a strong presumption of validity and will reject a challenge to the statute unless there are no reasonably

conceivable facts that could provide a rational basis for the classification. *Id.* (citing *Heller v. Doe,* 509 U.S. 312, 319 (1993) and *Beach,* 508 U.S. at 313). On this appeal, City has the burden of disproving the existence of any conceivable basis that would support the abrogation of derivative jurisdiction under § 1441, but not under § 1442. *Id.* (citing cases). Under rational-basis review, we "do not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (per curiam). "Once we have determined that there exists a plausible reason for the congressional action – and regardless of whether that reasoning actually motivated Congress – our inquiry is at an end." *Plyler,* 100 F.3d at 374.

Removal under § 1441 and removal under § 1442 serve two different ends: "Section 1441 relates to the rights of individuals. Section 1442, although dealing with individuals, vindicates also the interests of government itself; upon the principle that it embodies 'may depend the possibility of the general government's preserving its own existence.'" *Bradford v. Harding,* 284 F.2d 307, 310 (2d Cir. 1960) (quoting *Tennessee v. Davis,* 100 U.S. 257, 262 (1880)). In addition, the sections apply in two distinct scenarios. Section 1441 is the general removal statute and affords the defendant the right to remove a case to federal court through invocation of that court's original subject-matter jurisdiction to hear the case. *See* § 1441(a)-(b). By contrast, federal-officer removal provides a mechanism for federal officers to have

their federal defenses adjudicated in a federal forum. *See Willingham v. Morgan,* 395 U.S. 402, 407 (1969) ("[O]ne of the most important reasons for [federal officer] removal is to have the validity of the defense of official immunity tried in a federal court."); *Kolibash v. Comm. on Legal Ethics of the W. Va. Bar,* 872 F.2d 571, 576-77 (4th Cir. 1989) ("The federal officer removal statute permits a state action to be adjudicated on the merits in a federal court 'free from local interests or prejudice.'" (quoting *Arizona v. Manypenny,* 451 U.S. 232, 241-42 (1981))). Original subject-matter jurisdiction of the district court is not a requirement for removal under § 1442.

The distinctions between general removal and federal-officer removal provide plausible reasons for the congressional action at issue in this case. For example, because any case removed under § 1441 could have originally been brought in federal court, Congress may have thought it irrelevant whether the state court had jurisdiction over the action prior to removal. On the other hand, a case removed under § 1442 may not have had original federal jurisdiction, and thus Congress decided to retain the traditional rule that removal jurisdiction is derivative of state court jurisdiction prior to removal. In addition, Congress may have viewed federal-officer removal as guaranteeing a federal prerogative-adjudication of federal defenses in a federal forum – in as narrow a manner as possible, allowing a federal officer to remove, but mandating that the jurisdiction of the federal court over the removed action derive solely

from the state court's jurisdiction. Although the derivative-jurisdiction doctrine may be arcane or inefficient, our inquiry is one of mere rationality. Accordingly, we reject City National's equal protection argument as there is a conceivable rational basis for Congress abrogating derivative jurisdiction for removals effectuated via § 1441, but retaining the doctrine for cases removed under § 1442.

B.

Finally, City National argues that depriving it of the right to sue the federal defendants amounts to a deprivation of its property interests without due process of law.

To prove a due process claim, a litigant must show that it was deprived of a protected interest without due process of law. *See, e.g., Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n,* 94 F.3d 914, 920 (citing *Board of Regents v. Roth,* 408 U.S. 564, 571 (1972)). As discussed above, the application of the derivative-jurisdiction doctrine in this case does not bar City National from instituting a separate proceeding against the federal defendants in an appropriate forum. Given this conclusion, the district court's dismissal of City National's third-party complaint did not deprive it of any potential claim against the federal defendants. *Cf. id.* (discussing deprivation of property interest where statutory scheme did not allow late filing and withdrew jurisdiction over claim from all other courts). Because the

district court's dismissal of the third-party complaint did not deprive City National of a property interest, City National cannot state a due process violation.

V.

For the foregoing reasons, we conclude that we possess jurisdiction over City National's appeal, but deny that appeal because the district court properly applied the doctrine of derivative jurisdiction in concluding that it did not possess subject-matter jurisdiction over City National's third-party claims against the federal defendants. Accordingly, we affirm the ruling of the district court.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 29, 2007

No. 06-1151
2:05-cv-00458

JOHN PALMER; STACEY PALMER

Plaintiffs-Appellees

and

UNITED STATES DEPARTMENT
OF AGRICULTURE, Farm Service Agency

Third Party Defendant-Appellee

v.

CITY NATIONAL BANK, of West Virginia

Defendant-Appellant

and

STUART KAUFMANN; BANK ONE, N.A.

Defendants

MANDATE

The judgment of this Court, entered 8/16/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

JOHN PALMER and
STACEY PALMER,

Plaintiffs,

v. CIVIL ACTION NO. 2:05-0458

CITY NATIONAL BANK OF WEST VIRGINIA;
STUART KAUFFMAN and BANK ONE, N.A.,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the Court is the motion to dismiss of the third-party defendants, the United States Department of Agriculture and the Farm Service Agency. For the reasons set forth herein the motion is **GRANTED.**

I. Factual Allegations and Procedural Background

Plaintiffs filed their original complaint in the Circuit Court of Kanawha County, West Virginia on May 10, 2005, against City National Bank of West Virginia (City National). Plaintiffs amended their complaint on September 9, 2004, to add claims against the Defendants Stuart Kauffman and Bank One, N.A. On or about May 10, 2005, City National received the permission of the Circuit Court to pursue

a third-party claim against the United States Department of Agriculture (USDA) and the Farm Service Agency (FSA) alleging breach of contract, implied indemnification, and contribution. The case was removed to this Court by the United States on June 6, 2005, pursuant to 28 U.S.C. § 1442(a)(1), which allows for removal by the United States when an action against a federal agency is brought in state court. 28 U.S.C. §1442(a)(1). The United States subsequently moved to dismiss the third-party claims pursuant to Fed. R. Civ. Proc. 12(b)(1), arguing that this Court does not have subject matter jurisdiction over City National's claims.

II. Analysis

When a civil action is removed from state court pursuant to 28 U.S.C. § 1442(a)(1), the federal court to which it is removed acquires the same jurisdiction over the action as the state court. *Smith v. Cromer,* 159 F.3d 875, 879 (4th Cir. 1998). In other words, the federal court's jurisdiction is derivative of the state court jurisdiction. *Id.* Therefore, "where the state court lacks jurisdiction over the subject matter of the parties, the federal court acquires none upon removal, even though in a like suit orignally brought in federal court, the court would have had jurisdiction." *Id. See also Minnesota v. United States,* 305 U.S. 382, 389 (1939). The United States removed this action to federal court pursuant to 28 U.S.C. § 1442(a)(1), as such, this Court must first determine if the Circuit

Court of Kanawha County had subject matter jurisdiction over City National's third-party claims.

City National, in its third-party complaint, alleges breach of contract, implied indemnification, and contribution against the USDA and FSA. The Tucker Act vests exclusive jurisdiction for contract claims against the United States in excess of $10,000 in the United States Courts of Federal Claims. *See* 28 U.S.C. §1491. Additionally, the Federal Tort Claims Act vests exclusive jurisdiction for tort claims against the United States in the federal district courts. *See* 28 U.S.C. § 1346. City National, in their response, cite numerous authorities for the proposition that claims against the United States for indemnification and/or contribution are not barred.[1] However, the cases cited by City National were originally filed in federal district court; they were not removed pursuant to 28 U.S.C. § 1442(a)(1).[2] A federal district court does have jurisdiction over such claims if the claims were brought in federal court. However,

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[1] In footnote 3, City National admits that jurisdiction for its claims against the United States can be found in 28 U.S.C. § 1346. City National goes on to quote the language of the statute giving "exclusive jurisdiction" of such claims to the district courts. *See* City National's Resp. to Motion of the United States of America to Dismiss Third Party Complaint, fn. 3; *see also* 28 U.S.C. § 1346.

[2] City National does cite one case, *F.W. Eversley & Co., Inc. v. East New York Non-Profit HDFC, Inc.*, 409 F.Supp. 791 (S.D.N.Y. 1976), that appears to have been removed to federal court; however, the court does not address the issue of jurisdiction.

However, City National's third party claims were originally filed in the Circuit Court of Kanawha County, West Virginia and that court did not have jurisdiction to decide City National's third-party claims. Accordingly, this Court lacks subject matter jurisdiction over City National's claims based upon the principle of derivative jurisdiction.

Furthermore, where a case has been removed pursuant to 28 U.S.C. § 1442(a), "the district court may remand it back to state court only if it thereafter discovers a defect in removal procedure or a lack of subject matter jurisdiction in the federal court." *Jennison v. Wiley,* 14 F.3d 222, 238-39 (4th Cir. 1994). Thus, because this Court lacks subject matter jurisdiction over City National's claims, this case is remanded to the Circuit Court of Kanawha County, West Virginia.

III. Conclusion

For the reasons stated, the motion to dismiss of the United States is **GRANTED**; the claims of City National against the USDA and FSA are **DISMISSED** without prejudice; and the action is **REMANDED** to the Circuit Court of Kanawha County, West Virginia.

The Court **DIRECTS** the Clerk to send a copy of this written opinion and order to counsel of record and any unrepresented party.

ENTER: December 15, 2005

/s/ Robert C. Chambers
ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 15, 2007

No. 06-1151
2:05-cv-00458

JOHN PALMER; STACEY PALMER

Plaintiffs-Appellees

and

UNITED STATES DEPARTMENT
OF AGRICULTURE, Farm Service Agency

Third Party Defendant-Appellee

v.

CITY NATIONAL BANK, of West Virginia

Defendant-Appellant

and

STUART KAUFMANN; BANK ONE, N.A.

Defendants

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Gregory, and District Judge Norton.

For the Court,

/s/ Patricia S. Connor
CLERK

No. 07-937

In the Supreme Court of the United States

CITY NATIONAL BANK OF WEST VIRGINIA,
PETITIONER

v.

DEPARTMENT OF AGRICULTURE,
FARM SERVICE AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to abrogate this Court's doctrine of derivative jurisdiction as applied to the removal of cases from state court under 28 U.S.C. 1442, where Congress has abrogated the doctrine in another context, but specifically not eliminated it with respect to removals under Section 1442.

2. Whether application of the doctrine of derivative jurisdiction to this case violated the equal protection or due process guarantees of the Fifth Amendment.

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In the Supreme Court of the United States

No. 07-937

CITY NATIONAL BANK OF WEST VIRGINIA, PETITIONER

v.

DEPARTMENT OF AGRICULTURE,
FARM SERVICE AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 498 F.3d 236. The judgment of the district court (Pet. App. 29-33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2007. A petition for rehearing was denied on October 15, 2007 (Pet. App. 34-35). The petition for a writ of certiorari was filed on January 14, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad*, 258 U.S. 377 (1922), this Court explained that

"[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Id.* at 382; see *Arizona* v. *Manypenny*, 451 U.S. 232, 242 n.17 (1981) (citing cases).

In 1986, Congress limited the scope of the derivative jurisdiction doctrine by amending the general removal provision, 28 U.S.C. 1441, by adding Section 1441(e), which provides: "The court to which *such civil action* is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 637 (emphasis added). In 2002, Congress again amended Section 1441. It created a new Section 1441(e), redesignated the prior Section 1441(e) as Section 1441(f), and amended the language of Section 1441(f). See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11020(b)(3)(A), 116 Stat. 1827. As amended, Section 1441(f) provides: "The court to which a civil action is removed *under this section* is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." 28 U.S.C. 1441(f) (Supp. V 2005) (emphasis added).

The separate statutory section that governs removal from state court by the United States or federal officers or agencies, 28 U.S.C. 1442, has never been amended with respect to the doctrine of derivative jurisdiction.

2. John and Stacey Palmer filed this suit in the Circuit Court of Kanawha County, West Virginia, against petitioner City National Bank of West Virginia, as well as Bank One, N.A., and Stuart Kaufmann, alleging, *inter alia*, breach of contract and that the Palmers were induced to enter into certain loan agreements on the basis of fraudulent misrepresentations. C.A. App. 15-19; Pet. App. 3. Petitioner sought leave, which the state court granted, to file third-party claims against the United States Department of Agriculture (USDA) and the Farm Service Agency (FSA), alleging breach of contract, implied indemnification, and contribution. *Id.* at 3-4. Petitioner contends that the Palmers secured their loans "relying upon written representations by FSA that it would guarantee the loans." Pet. 3.

The federal defendants removed the case to the United States District Court for the Southern District of West Virginia pursuant to 28 U.S.C. 1442(a)(1) and moved to dismiss the third-party claims under Fed. R. Civ. P. 12(b)(1). Pet. App. 4. The United States argued that the United States' sovereign immunity deprived the Circuit Court of Kanawha County of jurisdiction to consider the third-party claims because the United States had not waived its sovereign immunity to contract or tort suits in state court, and that the district court acquired no jurisdiction to hear those claims upon removal under Section 1442. *Ibid.* The district court granted the United States' motion and dismissed petitioner's third-party claims on the basis of the derivative jurisdiction doctrine. *Id.* at 29-33. The court then remanded the remaining claims to state court. *Id.* at 32.

3. On appeal, petitioner argued that the derivative jurisdiction doctrine did not apply; that, if it did, the court should create an exception to the doctrine where

state law compels impleader, and that the doctrine would violate due process and equal protection if applied to petitioner's claims. Pet. App. 19-20.

The court of appeals first addressed its appellate jurisdiction to review the district court's order, in light of the fact that the order had remanded the underlying claims to state court, and 28 U.S.C. 1447(d) provides that remand orders are not reviewable on appeal. Pet. App. 5-15. The court concluded that it possessed appellate jurisdiction under this Court's decision in *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), which upheld review of a district court order dismissing a cross-claim in circumstances where the appellate court's decision would not affect the district court's remand order. *Id.* at 143-144. The court of appeals concluded that, under *Waco*, it had authority to review the district court's final order conclusively dismissing the claims against the federal defendants because review of that legally distinct issue, which would otherwise be unreviewable, would not undermine the remand aspect of the district court's order: "the state-court proceedings between the Palmers (as plaintiffs) and City National (as defendant)" would "proceed in state court regardless of whether the federal defendants were correctly dismissed." Pet. App. 14.

Turning to the merits, the court of appeals affirmed the district court's dismissal of petitioner's third-party claims on the basis of the derivative jurisdiction doctrine. Pet. App. 15-26. First, the court observed that Congress had, by the plain terms of Section 1441(f), abrogated the doctrine only with respect to actions removed under that section, and not those removed under Section 1442. "[B]ecause the plain language of § 1441(f) limits the abrogation of derivative jurisdiction to remov-

als under § 1441 and because [circuit] precedent h[eld] that the doctrine is viable for removals under § 1442," the court concluded that the doctrine applied to the instant dispute. *Id.* at 19. The court also declined to create an exception to the doctrine based upon the joinder requirements allegedly imposed by state law. The court observed that it would be inappropriate to make "a district court's jurisdiction over the case" turn upon state law rules of compulsory joinder. *Id.* at 19-20.

The court then addressed and rejected petitioner's constitutional arguments. The court stressed that petitioner "remains free to bring a separate action against the federal defendants in an appropriate forum, *i.e.*, the Court of Federal Claims, for its contract action, in accordance with the Tucker Act, [28 U.S.C. 1491(a),] and a district court, for its indemnity claims, in accordance with the [Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*]." Pet. App. 21. Even assuming, *arguendo*, that West Virginia law would provide a substantive defense to a contribution claim brought separately from the underlying action, the court stated that application of the derivative jurisdiction doctrine did not warrant heightened scrutiny because "operation of a substantive rule of law to bar a suit does not violate the right of access to a judicial forum." *Id.* at 22. Applying rational basis review, the court rejected petitioner's equal protection claim because "[t]he distinctions between general removal and federal-officer removal provide plausible reasons for the congressional action at issue in this case." *Id.* at 24. Finally, the court of appeals held that petitioner was not deprived of any property interest in violation of due process because "application of the derivative-jurisdiction doctrine in this case does not bar [petitioner] from instituting a separate pro-

ceeding against the federal defendants in an appropriate forum." *Id.* at 25.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. This Court long ago established the rule, which it has reaffirmed on numerous occasions, that "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction," and that "[i]f the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922); see *Arizona* v. *Manypenny*, 451 U.S. 232, 242 n.17 (1981) (citing cases).

As noted above, Congress recognized the derivative jurisdiction doctrine, and overruled it in part, in 1986 and again addressed the doctrine in 2002. Significantly, however, Congress limited its legislative alteration of the doctrine to removals under Section 1441, and did not disturb the rule with respect to removals by the United States, its agencies, or officials under Section 1442. Where Congress legislates against the backdrop of clear precedent from this Court, modifying one aspect of the judicial rule but not others, principles of stare decisis strongly counsel against the Court's overruling the part of the rule that Congress has implicitly endorsed by leaving it untouched. See, *e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384-386 (1983). That principle is particularly apposite here, where Congress revisited the statute a second time in a manner that clarifies

that Congress did *not* abrogate the judicial doctrine in its entirety.

In 1986, Congress limited the scope of the derivative jurisdiction doctrine as it applied to removals under the general removal provision, 28 U.S.C. 1441. That section authorizes removal, in certain circumstances, of actions brought in state court "of which the district courts of the United States have original jurisdiction," 28 U.S.C. 1441(a), of claims joined with those otherwise within the federal courts' original jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1441(c), and of suits against foreign states, 28 U.S.C. 1441(d), which are also within the federal courts' original jurisdiction unless the foreign state is immune, 28 U.S.C. 1330(a).[1] Congress limited the doctrine of derivative jurisdiction with respect to such removals by adding a new subsection (e) at the end of Section 1441, which provided that "[t]he court to which *such civil action* is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 637 (emphasis added). Through that amendment, Congress permitted suits that could have been brought in federal court as an original matter to proceed in federal court when brought there via removal under Section 1441(d), even if the state court did not possess jurisdiction.

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[1] In 2002, Congress further authorized removal of a state court action that arises from the same event that gave rise to a claim within the district court's jurisdiction under 28 U.S.C. 1369 (Supp. V 2005), concerning discrete events resulting in more than 75 deaths, even if the removed action "could not have been brought in a district court as an original matter." See 28 U.S.C. 1441(e)(1)(B) (Supp. V 2005).

Congress's 1986 legislation did not make any amendment to Section 1442 with respect to the derivative jurisdiction doctrine. At that time, Section 1442 authorized removal from state to federal court by any officer of the United States or its agencies, or those acting under any such officer, as well as by officers of the federal courts or Houses of Congress and property holders whose title derived from a federal officer. 28 U.S.C. 1442 (1982). Unlike Section 1441, Section 1442 authorized removal on the basis of a federal defense, such as immunity, regardless of whether the suit could have been brought originally in federal court. See *Mesa* v. *California*, 489 U.S. 121, 136 (1989) (Section 1442(a) "serves to overcome the 'well- pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged"). Later, Congress amended Section 1442 to permit removal by the United States or federal agencies on the basis of the defendant's federal status. See Federal Courts Improvement Act of 1996, Pub. L. 104-317, § 206(a), 110 Stat. 3850.

Despite the fact that Congress had specifically amended Section 1441 while leaving Section 1442 untouched with regard to the derivative jurisdiction doctrine, the Eighth Circuit construed the 1986 amendment has having eliminated the doctrine in its entirety. *North Dakota* v. *Fredericks*, 940 F.2d 333 (8th Cir. 1991); Pet. App. 20 (discussing *Fredericks*). In 2002, Congress again amended Section 1441 and clarified that the derivative jurisdiction doctrine is abrogated only with respect to Section 1441 removals. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11020(b)(3)(A), 116 Stat. 1827. The 2002 amendment redesignated the prior subsection (e) as subsection (f), and amended the language of the new sub-

section (f) to make clear that it applies only when "a civil action is removed *under this section*." 28 U.S.C. 1441(f) (Supp. V 2005) (emphasis added).

The court of appeals in this case correctly held that "the plain language of § 1441(f) limits the abrogation of derivative jurisdiction to removals under § 1441." Pet. App. 19. See *Barnaby* v. *Quintos*, 410 F. Supp. 2d 142, 144 (S.D.N.Y. 2005) ("In amending the statute in 2002, and replacing less precise language with much more specific language, Congress left no doubt that Section 1441(f) applies only to removals under Section 1441 and not to removals under any other section of the United States Code."); 14B Charles Alan Wright et al., *Federal Practice & Procedure* § 3721, at 191 (3d ed. Supp. 2007) ("New § 1441(f) limits the abrogation of the derivative jurisdiction doctrine to cases removed under [Section] 1441."). Where Congress has demonstrated its recognition of a well-established judicial construction of a statute and legislatively overturned that rule in only some respects, it can be presumed to have impliedly endorsed the rule to the extent it is not amended. See *Herman & MacLean*, 459 U.S. at 384-386.[2]

The Court should be especially wary of overruling established precedent where the backdrop rule against

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[2] In light of the 2002 amendment, the court of appeals' decision does not, contrary to petitioner's contention (Pet. 6), conflict with the Eighth Circuit's decision in *Fredericks*. As the court of appeals in this case explained, "[w]hether the Eighth Circuit correctly interpreted the 1986 amendment is academic, because in 2002," after *Fredericks* was decided, "Congress again amended § 1441." Pet. App. 17. Because "§ 1441(f) is more clear than former § 1441(e) in abrogating derivative jurisdiction only with respect to removals effectuated under § 1441," Pet. App. 19, the Eighth Circuit's construction of the old Section 1441(e) is irrelevant and does not present a conflict that this Court need resolve.

which Congress has acted concerns the jurisdiction of the federal courts over claims against the United States. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 756-757 (2008) (declining to overturn century-old precedent regarding jurisdictional nature of statute of limitations for claims before the Court of Federal Claims in light of Congress's implicit acquiescence by amending the statute without overruling that precedent). That concern is apposite here, where Congress has retained the derivative jurisdiction doctrine as it relates to removals by the United States. As the court of appeals explained, Congress had good reason to distinguish between the two statutes for purposes of the derivative jurisdiction doctrine. "[B]ecause any case removed under § 1441 could have originally been brought in federal court, Congress may have thought it irrelevant whether the state court had jurisdiction over the action prior to removal." Pet. App. 24. "On the other hand, a case removed under § 1442 may not have had original federal jurisdiction, and thus Congress decided to retain the traditional rule that removal jurisdiction is derivative of state court jurisdiction prior to removal." *Ibid.* If petitioner's position were adopted, plaintiffs could maneuver a claim against the United States into federal district court via removal in situations where neither the state nor federal district courts would have had original jurisdiction. Indeed, that is the case here: this action, which began as a state-law claim between non-diverse defendants, could not have been brought in federal court as an initial matter.

2. The court of appeals' holding that application of the derivative jurisdiction doctrine to petitioner's case was not unconstitutional is also correct and does not conflict with any decision of this Court or any court of

appeals. As the court of appeals correctly concluded, and as the discussion above demonstrates, the differences between removal under Section 1441 and Section 1442 amply justify their distinctive treatment for purposes of the derivative jurisdiction doctrine. Petitioner's equal protection claim must therefore fail. See Pet. App. 24.

Nor does application of the derivative jurisdiction doctrine deprive petitioner of a property interest without due process of law. As an initial matter, it is not clear that petitioner would, as it maintains (Pet. 9-12), be barred as a matter of substantive state law from pursuing a claim for contribution or indemnification from the United States in a separate proceeding in a federal court of competent jurisdiction. Although petitioner "takes exception to the Fourth Circuit's description of the state law * * * as 'procedural'" (Pet. 16), the very decision of the West Virginia Supreme Court of Appeals upon which petitioner relies (Pet. 9) describes the joinder rule as one of the "procedural aspects" of a contribution claim, *Howell* v. *Luckey*, 518 S.E.2d 873, 876 (W. Va. 1999). Moreover, by its terms, *Howell* appears only to require that the defendant "file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure," *id.* at 877, which petitioner did. None of the state decisions cited by petitioner specifies the consequences for a contribution claim if the defendant files a third-party claim, but the third-party defendant is found to be immune from the state court's jurisdiction. Whether West Virginia law has the effect petitioner claims cannot be determined until petitioner brings its claim against the United States in a court with jurisdiction to adjudicate the dispute on the merits. As the court of appeals observed, petitioner cannot claim

that it has been deprived of any right to judicial process when it "has not yet availed itself of the appropriate federal fora for resolving its claims against the federal defendants." Pet. App. 21-22.

Even assuming that petitioner's contribution and indemnification claims would fail as a matter of substantive state law if they cannot be litigated in the same action as the underlying dispute between the Palmers and petitioner, that would not make it a violation of due process for the federal courts to adhere to the limits on their jurisdiction that make it practically impossible for the claims to be litigated together. Indeed, it is an essential characteristic of the doctrine of sovereign immunity (the basis of the state court's and ultimately the federal court's lack of jurisdiction) that some claims against the sovereign will never be vindicated for want of a forum in which they can be asserted. For example, in *United States* v. *Neustadt*, 366 U.S. 696 (1961), the Court upheld the United States' assertion of sovereign immunity under 28 U.S.C. 2680(h) against a state law tort claim for misrepresentation, the very type petitioner asserts here, without any suggestion that the denial of a forum to litigate such claims against the United States violates due process. West Virginia's rule of compulsory joinder no more forms a basis for this Court to expand the district courts' removal jurisdiction under Section 1442(a) than the state law would warrant expanding the Court of Federal Claims' limited jurisdiction under 28 U.S.C. 1491(a) to cover the Palmer's underlying suit if it is ultimately determined that petitioner's claims against the United States sound in contract and therefore belong before that tribunal under the Tucker Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
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Attorney

APRIL 2008